Labor Law Practice Note

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Equal Employment Opportunity Settlement Negotiations: Does the Union Have A Right to Attend?

A bargaining unit employee filed a formal Equal Employment Opportunity (EEO) complaint alleging several instances of discrimination based on race and sex. During the processing of the complaint, the Department of Defense (DOD) Office of Complaint Investigations (OCI) recommended the parties engage in alternative dispute resolution to discuss a possible settlement. Both parties voluntarily agreed and subsequently reached a settlement regarding the complaint. The union has now filed an Unfair Labor Practice (ULP) claiming that the EEO settlement negotiation was a formal discussion that required the agency to give the union notice and an opportunity to attend. Has the agency committed a ULP?

Introduction

Under the Federal Service Labor-Management Relations Statute (FSLMRS),[1] an agency must give the exclusive representative of an appropriate bargaining unit the opportunity to be represented at any formal discussion between one or more agency representatives and one or more employees in the bargaining unit, or their representatives, concerning any grievance or any personnel policy or practices or other general condition of employment.[2] The purpose of this representational right is to grant the union a meaningful opportunity to participate in any discussions pertaining to the workplace in order to protect and represent the institutional interests of the bargaining unit.[3]

On its face, it is unclear whether this representational right includes union presence at EEO settlement negotiations between the agency and a member-of-the-bargaining-unit-complainant.[4] Arguably, the presence of a third-party-union-representative at such a negotiation might hinder an already difficult process, especially when the complainant does not want a union representative to participate.[5] Nevertheless, if EEO complaints are grievances, and if the settlement negotiation occurs under formal circumstances, then the union's independent right to representation entitles it to a participatory presence at the discussion.

Discussion

The Federal Labor Relations Authority (FLRA) has long asserted that EEO settlement negotiations are formal discussions of grievances under the FSLMRS.[6] The EEOC, however, clearly views the presence of unrequested-third-parties as unnecessary and as a potential impediment to complaint resolu-

1. 5 U.S.C. §§ 7101-7135 (2000).

2. *Id.* § 7114(a)(2).

3. Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 957 (1979). "The union's presence at a formal discussion concerning general working conditions as envisioned by Congress in enacting the Statute was intended to improve the quality of the discussion and allow unions to protect their institutional rights to be the employees' sole representative." Memorandum, Joe Swerdzewski, General Counsel, to Regional Directors, subject: Guidance on Meetings Under the Federal Service Labor-Management Relations Statute–Rights & Obligations and Strategies to Avoid Conflict pt. II.A. (25 Jan. 2001), *available at* http://www.flra.gov/gc/guidance/gc_meet_start.html.

4. Throughout this note, the term negotiation is used interchangeably with mediation, discussion, and alternate dispute resolution. Where the term complainant is used, it always refers to an employee who is also a member of the bargaining unit. Finally, all references to EEO complaints mean formal complaints, filed under 29 C.F.R. § 1614.106, unless otherwise specifically stated. 29 C.F.R. § 1614.106 (2003).

5. "The inclusion of a third party with broader interests and concerns could have a negative impact on this system of reaching individualized settlement of complaints." United States Dep't of Def., Def. Contract Mgmt. Agency, East Indianapolis, Indiana, 59 FLRA 207 (2003) (DCMA) (providing Administrative Law Judge Devaney's opinion describing the argument of the government). *See also* U.S. Dep't of Air Force, 436th Airlift Wing, Dover Air Force Base, Dover, Delaware, 57 FLRA 304 (2001) (Dover I) (stating that the FLRA rejected the hypothetical argument that "union representation (at the EEO mediation) might chill candid discussions").

6. *See* IRS Fresno Serv. Ctr., Fresno, California, 7 FLRA 371 (1981). In this case, the FLRA first held that discussions related to EEO complaints were grievances under the FSLMRS. *Id.* The Ninth Circuit, however, reversed that holding two years later. IRS, Fresno Serv. Ctr. v. FLRA, 706 F.2d 1019 (9th Cir. 1983) (Fresno II) (holding that an EEO pre-complaint conciliation conference is not a formal discussion and does not concern a grievance). In view of the Ninth Circuit's reversal, the FLRA "reexamined" the meaning of grievance and subsequently decided that complaints brought under an alternate statutory appeal procedures (such as EEO) were not grievances under the FSLMRS. Bureau of Gov't Fin. Operations, Headquarters and Nat'l Treasury Employees Union, 15 FLRA 423 (1984) (NTEU I). The Court of Appeals for the District of Columbia, however, subsequently reversed that decision. NTEU v. FLRA, 774 F.2d 1181 (D.C. Cir. 1985) (NTEU II). Since then, the FLRA has consistently held that complaints under a statutory appeals procedure are grievances within the meaning of the FSLMRS. *See* U.S. Dep't of Justice, Bureau of Prisons, Fed. Correctional Inst. (Ray Brook, New York), 29 FLRA 584, 589-90 (1987) (describing the evolution of the FLRA's position on statutory appeals as grievances within the meaning of the FSLMRS), *aff'd sub nom.*, Am. Fed'n of Gov't Employees, Local 3882 v. FLRA, 865 F.2d 1283 (D.C. Cir. 1989) (affirming the FLRA's decision that a grievance within the meaning of section 7114(a)(2)(A) can encompass a statutory appeal); *see also* 5 U.S.C. § 7114(a)(2)(A).

tion. Its position is that "any activity conducted in connection with an agency's ADR program during the EEO process would not be a formal discussion within the meaning of the [FSLMRS]." [7]

In 1999, the Ninth Circuit resolved the apparent conflict holding that EEO settlement discussions were not grievances under the FSLMRS, and therefore did not require notice and an opportunity for union representation.[8] Subsequently, in 2003, the Court of Appeals for the District of Columbia (D.C.) specifically disagreed with the Ninth Circuit and held that EEO settlement negotiations are grievances under the FSLMRS and that the exclusive representative has an independent right to attend to protect the union's interests.[9] In *United States Department of the Air Force, Luke Air Force Base, Arizona* (*Luke III*),[10] the FLRA resolved[11] the conflict between the D.C. and Ninth Circuit. The FLRA held that EEO settlement negotiations are grievances and therefore trigger the notice provisions of the FSLMRS if they occur under formal circumstances.[12]

In *Luke III*, the Air Force conducted three EEO settlement mediations with the complaining employee, without informing the union.[13] The union alleged that these mediation sessions were formal discussions of grievances which triggered their right to notice and an opportunity to attend.[14] In deciding the case, the FLRA focused on three issues: (1) whether an EEO settlement negotiation is formal within the meaning of the FSLMRS; (2) whether the EEO complaint is considered a grievance within the meaning of the FSLMRS; and (3) whether potential union participation undermines the EEOC's exclusive authority to resolve complaints of discrimination.

Whether an EEO Settlement Negotiation Is Formal Under the FSLMRS

In order for the union's representational right to be triggered, the FSLMRS requires: (i) a discussion; (ii) which is formal; (iii) between a representative of the agency and a unit employee; and (iv) which concerns any grievance or any personnel policy or practice or other general condition of employment.[15] In *Luke III*, the FLRA considered the first three elements together, as part of their formality analysis.

In determining whether a discussion is sufficiently formal to trigger the union's representational right, the FLRA considers the totality of the circumstances, to include:

> (1) the status of the individual who held the discussions; (2) whether any other management representatives attended; (3) the site of the discussions; (4) how the meeting for the discussions were called; (5) the length of the discussions; (6) whether a formal agenda was established; and (7) the manner in which the discussions were conducted.[16]

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7. Federal Sector Equal Employment Opportunity, 64 Fed. Reg. 37,645 (July 12, 1999) (final rule); *see also* 42 U.S.C. § 2000e-4 (stating the authority for enforcing the Civil Rights Act resides with the EEOC); 29 C.F.R. §§ 1614.108(b) (stating agencies are encouraged to settle disputes early using alternate dispute resolution techniques),1614.109(e) (finding attendance at EEOC hearings is limited to those with direct knowledge relating to the complaint); UNITED STATE EQUAL EMPLOYMENT OPPORTUNITY COMM'N MGMT. DIR. 110 ch. 3, sec. I (1999) [hereinafter EEOC MGMT. DIR. 110] (requiring federal agencies to establish an ADR program for EEO complaints and stating that confidentiality is an essential component of such a system; also stating that pre-and post-complaint information "cannot be disclosed to a union unless the complaining party elects union representation or gives his written consent").

8. Luke Air Force Base v. FLRA, 208 F.3d 221 (9th Cir. 1999) (Luke II), *reported in full at* 1999 U.S. App. LEXIS 34569.

9. Dep't of the Air Force, 436th Airlift Wing, Dover Air Force Base v. FLRA, 316 F.3d 280 (D.C. Cir. 2003) (Dover II). *Dover II* provided for one exception to union representation. *See infra* notes 44-48 and accompanying text.

10. 58 FLRA 528 (2003).

11. *See infra* notes 32-34 and accompanying text (discussing the authority of the FLRA to resolve a conflict between circuits).

12. *Luke III*, 58 FLRA at 528.

13. *Id*. at 528-29.

14. *Id*. The union claim alleged a violation of 5 U.S.C. § 7116(a)(1), (8) (2000).

15. 5 U.S.C. § 7114(a)(2)(A).

16. *Luke III*, 58 FLRA at 532. *See also* Gen. Servs. Admin., Region 9 and Am. Fed'n of Gov't Employees, Council 236, 48 FLRA 1348, 1355 (1994) (listing the same seven illustrative indicia of formality) (GSA). "These factors are illustrative, and other factors may be identified and applied as appropriate in a particular case." Luke Air Force Base and Am.Fed'n of Gov't Employees, Local 1547, 54 FLRA 716, 724 (1998) (Luke I) (referencing F.E. Warren Air Force Base, Cheyenne, Wyoming, 52 FLRA 149, 157 (1996)).

Using this list of illustrative factors, the Air Force argued against formality in *Luke III*, claiming that no management representatives directly participated in the negotiation, that there was no formal agenda, and that the sessions were voluntary.[17] The FLRA rejected these arguments and found the EEO mediation sessions to be sufficiently formal to trigger the union's representational rights.

To start, the FLRA completely rejected the argument that there was no direct management exchange with the complaining employee.[18] The FLRA stated that when the mediator served as a go-between for the parties, the employee and management were "engaged in responding to each other's settlement position, and that they were no less engaged than if they had been speaking face-to-face."[19] Regarding the agency's assertion that there was no formal agenda for the negotiations, the FLRA stated that the agenda requirement was satisfied because the mediation sessions were "planned in advance and had . . . clearly-defined objectives and procedures that were communicated [between] all the participants."[20] Finally, while the FLRA acknowledged that the voluntary nature of the mediation sessions mitigated against formality, they specifically found this fact alone insufficient to overcome the other indicia of formality.[21]

The FLRA's analysis in *Luke III* indicates an extremely open approach to determining formality. Under this approach, the FLRA will consider virtually any EEO mediation as formal.[22] Accordingly, while each situation must still be analyzed separately for the indicia of formality, agency counsel are advised to exercise extreme caution before asserting that an EEO settlement negotiation is not sufficiently formal to satisfy the FSLMRS.

Whether the EEO Complaint Is a Grievance Under the FSLMRS

Although the FLRA in *Luke III* found the EEO mediation to be sufficiently formal to satisfy the FSLMRS, the mediation must still concern a grievance or other condition of employment to trigger the union's representational right. Ultimately, the most significant aspect of the decision in *Luke III* was the FLRA's unequivocal statement that EEO settlement negotiations are grievances within the meaning of the FSLMRS.

The FSLMRS defines a grievance as:

> any complaint . . . (A) by any employee concerning any matter relating to the employment of the employee . . . [or concerning either:] (i) the effect or interpretation, or claim of breach, of a [collective bargaining agreement]; or (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.[23]

In addressing whether or not a complaint filed under the agency's EEO process fits this definition of grievance, the FLRA in *Luke III* compared the conflicting opinions of the Ninth and D.C. Circuits.

In *Luke II*, a case involving facts similar to those in *Luke III*,[24] the Ninth Circuit found that the term grievance was meant to cover those complaints filed under the collective bargaining agreement's negotiated grievance procedure, not complaints filed under alternate statutory mechanisms.[25] More specifically, the Ninth Circuit stated that the union's representational

17. *Luke III*, 58 FLRA at 530.

18. The Air Force argument was premised on the fact that their management representative was rarely in the same room with the employee and that "the mediator primarily held separate meetings with the parties in which she relayed their respective positions." *Id.* at 533.

19. *Id.* The FLRA specifically avoided the question of whether or not the mediator was a management representative. *Id.*; *see also Luke I*, 54 FLRA at 724-25 (finding it unnecessary to address the air force assertion that the OCI investigator was not a management representative).

20. *Luke III*, 58 FLRA at 533. The FLRA also stated that since the meetings took place away from the employee's work area and in the agency attorney's office, this supported a finding of formality. *Id.* at 532-33.

21. *Id*. at 533.

22. Even in *Luke II*, the Ninth Circuit let stand that aspect of the FLRA's decision which found the EEO negotiations between the complainant and management to be sufficiently formal to satisfy the FSLMRS. Luke II, 208 F.3d 221 (9th Cir. 1999), *reported in full at* 1999 U.S. App. LEXIS 34569.

23. 5 U.S.C. § 7103(a)(9) (2000). The General Counsel has issued guidance stating that informal EEO complaints are not considered grievances under the FSLMRS. *Id.* § 7114(a)(2)(A). Informal EEO complaint meetings, however, might nevertheless constitute formal discussions if the indicia of formality are present and the negotiations concern a personal policy or practice or general condition of employment. *See* Memorandum, Joe Swerdzewski, FLRA General Counsel, to Regional Directors, subject: Guidance on Applying the Requirements of the Federal Service Labor-Management Relations Statute to Processing Equal Employment Opportunity Complaints and Bargaining Over Equal Employment Opportunity Matters (26 Jan. 1999), *available at* http://www.access.gpo.gov/flra/gc/gc_eeo1.html. The General Counsel is currently revising this Guidance. *See* Fresno II, 706 F.2d 1019, 1024 (D.C. Cir. 1983) (holding that a negotiation related to an informal EEO complaint is not a grievance under the FSLMRS).

24. Although *Luke II* and *Luke III* arose at the same Air Force base, they each involved different EEO complainants. *See Luke III*, 58 FLRA at 528; *Luke II*, 1999 U.S. App. LEXIS 34569, at *1.

right was not triggered because the EEO process was "discrete and separate from the grievance process to which 5 U.S.C. [§] . . . 7114 [is] directed."[26] Conversely, four years later in *Dover II*, the Court of Appeals for the District of Columbia specifically rejected this argument and reached the exact opposite conclusion.[27] In *Dover II*, noting that the language of the FSLMRS was extremely broad, the court found that including EEO settlement discussions within the definition of grievance represented "a natural reading of the broad statutory language."[28]

After analyzing both cases, the *Luke III* FLRA adopted the D.C. Circuit's broad interpretation of the FSLMRS's definition of grievance. In reaching its decision, the FLRA relied on the express language, the legislative history, and the intended purpose of the representational rights guaranteed by the FSLMRS.[29] The FLRA found that all three of these factors wholly and absolutely supported the conclusion that EEO settlement negotiations are grievances which trigger representational rights under the FSLMRS. Unlike *Luke III*'s formality analysis, which at least left open the possibility of circumstances when an EEO mediation might not be sufficiently formal,[30] the holding that EEO settlement negotiations are grievances left no room for distinguishing circumstances.[31]

Although *Luke III* arose within the jurisdictional area of the Ninth Circuit, the FLRA's decision was not limited by Ninth Circuit precedent. While it may seem strange that the FLRA could essentially ignore a Court of Appeals decision for the area in which a case arose, the FLRA has specifically noted that the case law of a single circuit does not bind the Authority.[32] The Supreme Court has stated that the FLRA is entitled to "considerable deference when it exercises its special function of applying the general provisions of the [FSLMRS] to the complexities of federal labor relations."[33] Accordingly, in *Luke III*, the FLRA acknowledged, and then specifically (and respectfully) disagreed with the Ninth Circuit's precedent, adopting its own reasoning in finding that EEO settlement discussions are grievances under the FSLMRS.

Since the decision in *Luke III*, the FLRA has twice reaffirmed its position that EEO settlement discussions are grievances which trigger the representational rights of the FSLMRS, to include a second case arising in the jurisdictional area of the Ninth Circuit.[34]

Whether Potential Union Participation Undermines the EEOC's Exclusive Authority to Resolve Complaints of Discrimination

Finally, the *Luke III* decision also addressed the argument that the union's representational right at EEO settlement discussions inappropriately intrudes on the exclusive authority of the EEOC to resolve complaints of discrimination.[35] While this argument represents in part a collateral attack on the formality and grievance elements of the FSLMRS,[36] it is primarily an

25. The Ninth Circuit specifically noted that the collective bargaining agreement at issue explicitly excluded discrimination claims from the negotiated grievance procedure. *Luke II*, 1999 U.S. App. LEXIS 34569, at *5.

26. *Id.*; *see* 5 U.S.C. § 7114.

27. Dover II, 316 F.3d 280, 284-85 (9th Cir. 1999) (citing NTEU II, 774 F.2d 1181 (D.C. Cir. 1985)) (holding that FSLMRS grievances include those filed under alternate statutory procedures, to include the MSPB). The conflict between the Ninth and D.C. Circuits on this issue actually dates back to 1985 when, in *NTEU II*, the D.C. Circuit rejected the Ninth Circuit's argument in *Fresno II*. *See NTEU II*, 774 F.2d at 1181; Fresno II, 706 F.2d 1019 (9th Cir. 1983) (finding no representational right to participate in an EEO precomplaint conciliation conference). Due to some distinguishing facts between these earlier cases, the recent conflicting cases are far more significant.

28. *Dover II*, 316 F.3d at 285 (referencing Dover I, 57 FLRA 304, 309 (2001)).

29. *Luke III*, 58 FLRA at 533.

30. Albeit a slim possibility. *See supra* notes 15-22 and accompanying text.

31. The decision, however, did articulate one possible means by which a union could be excluded from participation. *See infra* notes 44-48 and accompanying text.

32. *See* Headquarters, National Aeronautics and Space Administration, Washington, D.C. and National Aeronautics and Space Administration, Office of the Inspector General, Washington, D.C., 50 FLRA 601, 612-14 (1995), *enforced*, 120 F.3d 1208 (11th Cir. 1997), *aff'd*, 527 U.S. 229 (1999) (stating that the FLRA declined to follow the D.C. Circuit's interpretation of the FSLMRS as it pertains to representatives of an agency).

33. Nat'l Fed'n of Fed. Employees, Local 1309 v. Dep't of the Interior, 526 U.S. 86, 99 (1999). All of the federal circuits have held that a decision of the FLRA may be set aside only if it is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." Dep't of Veterans Affairs Med. Ctr. v. FLRA, 16 F.3d 1526, 1529 (9th Cir. 1994). *See, e.g.*, Tinker AFB v. FLRA, 321 F.3d 1242 (10th Cir. 2002) (establishing the rule that the circuit will only overturn a decision of the FLRA if it is arbitrary, capricious, or an abuse of discretion); Dep't of Health and Human Srvs. v. FLRA, 844 F.2d 1087, 1090 (4th Cir. 1988) (en banc) (holding that FLRA decisions must be enforced unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

34. *See* United States Dep't of the Air Force, Luke Air Force Base, Ariz., 59 FLRA No. 5 (2003) (Luke IV) (finding a ULP when the agency did not provide the union with notice and an opportunity to attend an EEO settlement discussion based on the holding that EEO settlement discussions are formal discussions under the FSLMRS); United States Dep't of Def., Def. Contract Mgmt. Agency, East Indianapolis, Indiana, 59 FLRA No. 34 (2003) (finding a ULP when the agency did not provide the union with notice and an opportunity to attend an EEO settlement discussion based on the holding that EEO settlement discussions are formal discussions under the FSLMRS).

argument about the complaining employees' confidentiality concerns.

The EEOC regulations state that only parties with direct knowledge relating to the complaint may attend EEO hearings.[37] In *Luke III*, the FLRA acknowledged this provision, but stated that since it did not specifically exclude unions, it was not dispositive on the issue of union participation in an otherwise formal discussion.[38] In fact, the FLRA argued that union participation was specifically authorized because the union's institutional interests made them a "party" or a "nonparty participant" under other applicable regulations.[39]

Regarding the argument that union participation might threaten the confidentiality concerns of the complaining employee, the FLRA noted that this was a purely hypothetical concern under the facts of *Luke III*.[40] While the FLRA acknowledged the requirement to maintain confidentiality at EEO proceedings,[41] it questioned the proposition that union participation would automatically violate this confidentiality, asserting that unions are often required to maintain confidentiality within their representational duties. The FLRA suggested that a confidentiality agreement could easily bind the union before participating in an EEO settlement mediation.[42]

Finally, although the FLRA did not address the argument that the union's third-party-presence at an EEO settlement negotiation might hinder the ability to reach an accommodation, it is unlikely that the FLRA would accept such an argument. The purpose of the union's representational right is not to make discussions easier. Rather, the purpose is to protect the institutional interests of the union. More importantly, however, union participation does not necessarily prevent the complainant and the agency from signing a settlement agreement with which the union might disagree.[43]

Direct Conflict Exception

Although *Luke III* unequivocally held that EEO settlement discussions are grievances that trigger the union's representational rights, the FLRA acknowledged one circumstance in which a union might be excluded from participation in a negotiation. Acquiescing in part to the argument that there are potential confidentiality issues associated with some discrimination complaints, the FLRA stated that when there is a "direct conflict" between the union's right to participate in formal discussions and the employee's rights as a victim of discrimination, an "appropriate resolution is required."[44]

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35. 42 U.S.C. § 2000e-4 (2000) (noting the authority for enforcing the Civil Rights Act resides with the EEOC); 29 C.F.R. 1614.109(e) (2003) (stating attendance at EEOC hearings are limited to those with direct knowledge relating to the complaint).

36. *See supra* notes 15–22 and accompanying text.

37. 29 C.F.R. 1614.109(e) (stating attendance at EEOC hearings is limited to those with direct knowledge relating to the complaint).

38. Luke III, 58 FLRA 528, 534 (2003).

39. *Id.* (citing Dover II, 316 F.3d 280, 310 (9th Cir. 1999) (referencing the Administrative Dispute Resolution Act (ADRA), 5 U.S.C. §§ 571-583). Although unstated, the FLRA would probably extend this argument and assert that the union's institutional interests presume direct knowledge relevant to all grievances.

40. *Luke III*, 58 FLRA at 535. In fact, in *Luke III*, the complaining employee willingly discussed her complaint with the union vice president upon meeting him unexpectedly in the hallway during a break in the mediation. *Id.*

41. 5 U.S.C. § 574 (requiring confidentiality in all alternate dispute resolution proceedings); 29 C.F.R. § 1614.108(b) (stating agencies are encouraged to settle disputes early using alternate dispute resolution techniques); *see also* Federal Sector Alternative Dispute Resolution Fact Sheet (Apr. 17, 2002) ("Fairness requires voluntariness, neutrality, confidentiality, and enforceability."), *available at* http://www.eeoc.gov/federal/adr/facts.html (last visited Apr. 8, 2004); EEO MGMT. DIR. 110, *supra* note 7 (requiring federal agencies to establish an ADR program for EEO complaints and stating the confidentiality is an essential component of such a system).

42. Such confidentiality agreements could either be signed on a case-by-case basis for each EEO mediation, or could be included in the collective bargaining agreement. The consequences of the union refusing to sign a confidentiality agreement raises the possibility of a "direct conflict" which might justify their exclusions from the EEO discussion. *See infra* notes 44-48 and accompanying text.

43. If the settlement involves a change to a condition of employment, the union might have an alternate means of stopping the settlement agreement. *See infra* note 48 and accompanying text.

44. *Luke III*, 58 FLRA at 535 (quoting Dover I, 57 FLRA 304, 309 (2001) (citing NTEU II, 774 F.2d 1181, 1189 n.12 (D.C. Cir. 1985)). In *NTEU II*, the Court of Appeals for the District of Columbia stated that:

> Congress has explicitly decided that a conflict between the rights of identifiable victims of discrimination and the interests of the bargaining unit must be resolved in favor of the former. Title VII of the Civil Rights Act of 1964 . . . provides that the right of an aggrieved employee to complete relief takes priority over the general interests of the bargaining unit . . . a *direct* conflict between the rights of an exclusive representative under § 7114(a)(2)(A) and the *rights* of an employee victim of discrimination should also presumably be resolved in favor of the latter.

774 F.2d at 1189 n.12 (emphasis in original).

Determining what facts are necessary to establish a direct conflict is not clear. The concurring opinion in *Luke III* describes one possibility—when the "employee unequivocally requests that the exclusive representative not be present at a mediation session of a formal [EEO] complaint . . . the rights of the employee should presumably prevail."[45] The D.C. Circuit used this same example to describe a circumstance when it might support excluding the union from an EEO mediation.[46]

Agencies have raised a direct conflict type argument in numerous cases during the last several years. In every case in which it was raised, however, the FLRA has dismissed the argument based on the fact that the conflict issues raised by the agency were always hypothetical. Labor counselors are therefore advised to gather and consider all evidence of a direct conflict between the employee's discrimination complaint and the union's right to representation, to include a determination of the complaining-employee's personal preference regarding the union's presence.[47]

Even if there is a direct conflict which precludes union participation in the EEO settlement negotiations, the union may nevertheless be entitled to notice and an opportunity to bargain if the resulting EEO settlement agreement includes a proposed change to a condition of employment.[48] Therefore, labor counselors are well advised to consider this possibility if they determine exclusion from the EEO settlement negotiation is appropriate under the direct conflict exception.

Proposed Legislation and the National Security Personnel System

The National Defense Authorization Act (Authorization Act) for 2004 almost resolved the conflict of whether or not an EEO settlement negotiation is a formal discussion under the FSLMRS. One version of the proposed Authorization Act specifically sought to reverse the FLRA's position on this issue and legislated that "discussions related to [EEO] complaints are not formal discussions."[49] Although this provision was not contained in the final version of the bill, the Authorization Act contains another provision which might still reverse the FLRA's position on EEO settlement negotiations within the DOD.

The Authorization Act directs the Secretary of Defense to create a new human resources management system for DOD civilians, known as the National Security Personnel System (NSPS).[50] On 6 February 2004, the DOD published an Outline of Proposed Labor Relations System Concepts (NSPS Concepts).[51] Among numerous other changes, the NSPS Concepts included a proposal that no portion of the EEO process will be considered a formal discussion. While the NSPS Concepts have not yet been published for implementation, and while they are still subject to a great deal of union opposition,[52] DOD attorneys would be well-advised to stay abreast of the possibility of change in this area.[53]

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45. *Luke III*, 58 FLRA at 538 (Member Armendariz, concurring).

46. Dover II, 316 F.3d 280, 287 (D.C. Cir. 2003) ("We do not foreclose the possibility that an employee's objection to the union presence could create a 'direct' conflict that should be resolved in favor of the employee.").

47. The agency must learn the employee's preference without violating the FSLMRS.

48. 5 U.S.C. §§ 7102(2), 7103(a)(14), 7114(b)(2) (2000). Labor counselors should be aware that previous FLRA cases seem to suggest that the union's right to representation at EEO settlement discussions could also be premised on the fact that "discussions of EEO settlement agreements . . . . [are] conditions of employment." Marine Corps Logistics Base, Barstow, California and Am. Fed'n of Gov't Employees, Local 1482, 52 FLRA 1039, 1043 (1997).

49. S. 747, sec. 1103(b) (seeking to amend subpara. (A), sec. 7114(a)(2)).

50. Pub. L. No. 108-136, § 1101, 117 Stat. 1618 (2003) (codified at 5 U.S.C. § 9902). In creating this new civilian personnel system, the law permits the DOD to waive certain laws and regulations that currently apply to civilian employees. The purpose of the NSPS is to allow flexibility in managing civilian employees while insuring compliance with the principles of the merit system and collective bargaining while also giving the DOD flexibility to accomplish its mission of national security.

51. *See* NSPS, *NSPS Labor Relations System, available at* http://www.cpms.osd.mil/nsps/lrs_dod.html (last visited Apr. 12, 2004) (outlining "concepts that the [] (DOD) has developed as part of the beginning of the collaborative process of designing and building a new labor management relations system for DOD employees).

52. *See* Stephen Barr, *Unions Ask Help of Congress on Pentagon's New Civil Service System*, WASH. POST, Mar. 3, 2004, at B2; *Federal Unions Unite to Fight Union Busting Labor Relations Plan at DOD*, FED. EMPLOYEE (NFFE Newsletter), Feb. 2004, at 1; Tia Kauffman, *DOD Personnel Plan Under Fire from Lawmakers, Union*, FED. TIMES, Mar. 8, 2004, at 13; Shawn Zeller, *Senator Blasts Defense Personnel Overhaul Design Process*, GOV'T EXECUTIVE MAG., Mar. 2, 2004.

53. *See* Shawn Zeller, *Pentagon Slows Schedule for Rolling Out New Personnel System*, GOV'T EXECUTIVE MAG., Apr. 14, 2004 (noting that the new labor relations system will be implemented in November 2004). The Department of Homeland Security (DHS) recently proposed rules to "establish a new human resources management system within DHS." Department of Homeland Security Human Resources Management System, 69 Fed. Reg. 8030 (Feb. 20, 2004). Among other things, the DHS regulations specifically exclude all discussions regarding EEO complaints from the definition of formal discussions. *Id*. Practitioners should note that even if the exclusive representative no longer has the representational right to notice and an opportunity to attend discussions regarding EEO complaints, they might still have the right to bargain regarding any change to conditions of employment contained within an EEO settlement agreement. Astute labor counselors will insure that implementation of an EEO settlement agreement that requires a change in a condition of employment will be contingent on the agency fulfilling their statutory duty to bargain with the union.

Conclusion

Until and unless the NSPS is implemented, Army labor counselors should act with caution regarding EEO settlement negotiations. This is crucial because the FLRA requires notice and an opportunity to participate in any EEO settlement negotiation. Even installations located in the Ninth Circuit cannot rely on the *Luke II* decision because that circuit's case law does not bind the FLRA.[54] The FLRA will undoubtedly continue to sanction agencies which do not give the union notice and an opportunity to attend EEO settlement negotiations.

Unless a labor counselor has good facts supporting a direct conflict between the union's representational right and the employee's EEO rights, they should treat EEO settlement negotiations as formal discussions and give the union notice and an opportunity to attend.[55]

54. *See supra* notes 32–33 and accompanying text.

55. Rather than dealing with this conflict when it arises, labor counselors should consider addressing union participation in EEO Settlement Negotiations in the Collective Bargaining Agreement.

Legal Assistance Practice Note

The National "Do-Not-Call" Registry and Other Recent Changes to the Federal Trade Commission's Telemarketing Sales Rule

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The Judge Advocate General's Legal Center & School

Introduction

As *Sergeant Smith* is sitting down for dinner, he hears his phone ring. The telemarketer warns *Sergeant Smith* that if he does not purchase credit card loss protection insurance, he may be liable for all unauthorized charges on his credit card. The telemarketer explains to *Sergeant Smith* that in this computer age, hackers can access his computer and charge massive amounts on his credit card account. The insurance is only a few dollars per month. *Sergeant Smith* buys the insurance to avoid the risk of paying thousands of dollars for someone else's charges. Now, *Sergeant Smith* regrets his hasty decision. Can the law provide him with any relief?

The answer is *yes*. In January 2003, Congress passed the Telemarketing and Consumer Fraud and Abuse Prevention Act[1] which significantly amended the Telemarketing Sales Rule (TSR).[2] Among these amendments, the TSR now requires that when a telemarketer attempts to sell any type of credit card loss protection insurance, the telemarketer must explain to the consumer that the consumer's maximum liability for unauthorized use of his credit card is fifty dollars.[3] Further, the amendments require a telemarketer to provide the consumer's telephone caller identification service with the telemarketer's phone number and, if possible, the telemarketer's company name.[4]

Along with these special protections, the Telemarketing and Consumer Fraud and Abuse Prevention Act amended the TSR in numerous other ways to prevent telemarketing fraud and to thwart the majority of telemarketers from contacting consumers altogether. This note highlights those changes. First, it discusses the "do-not-call" registry, to include exceptions to the registry. Next it covers special protections for certain types of calls. The note then explores unique rules for charity telemarketers, followed by a discussion of the added protections to the unauthorized billing rules. Finally, the note discusses enforcement of the TSR.

The Do-Not-Call Registry

The most far-reaching change stemming from the 2003 amendments to the TSR is the creation of a national do-not-call registry. If a consumer registers[5] his phone number on the FTC's do-not-call list, then a telemarketer cannot call that number[6] unless the telemarketer has express written permission from the consumer to place such calls[7] or the telemarketer and the consumer have an established business relationship.[8] These protections last five years from the original date the phone number is registered.[9] Further, before they make any calls, the TSR

1. 15 U.S.C. §§ 6101-6108 (2000).

2. 16 C.F.R. § 310 (2003). The FTC issued the initial TSR in 1995. *Id.*

3. *Id.* subpt. 310.3(a)(vi).

4. *Id*. subpt. 310.4(a)(7). The TSR allows telemarketers to substitute the name of the seller or charitable organization that they represent if they have an employee who answers the phone number during regular business hours. *Id.*

5. Fifteen states shared their information with the national registry. Consequently, consumers who registered on their respective state's do-not-call list before 26 June 2003 did not have to re-register their numbers on the national list. These states include Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Kansas, Kentucky, Maine, Massachusetts, Minnesota, New York, North Dakota, and Oklahoma. Federal Trade Commission, *FTC Q&A: The National Do Not Call Registry, available at* http://www.ftc.gov (last visited Mar. 9, 2004) [hereinafter *FTC Q&A*].

6. Even if a consumer does not register his number on the do-not-call list, the FTC amendments still provide a consumer with relief from unwanted calls. A consumer may stop a telemarketer from calling again on behalf of a particular seller if the consumer simply tells the telemarketer that he does not wish to receive calls on behalf of that seller. 16 C.F.R. subpt. 310.4(b)(iii)(B)(i).

7. *Id.* subpt. 310.4(b)(iii)(A). The written agreement must have (1) the consumer's signature; (2) the number the consumer is allowing the telemarketer to call; and (3) the identity of the specific party the consumer is authorizing to call him. *Id*.

8. *Id.* subpt. 310.4(b)(iii)(B)(ii). The TSR defines an "established business relationship" as a relationship between the consumer and seller based on a

> purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within eighteen months immediately proceeding the date of the telemarketing call; or the consumer's inquiry or application regarding a product or service offered by the seller within three months immediately preceding the date of the telemarketing call.

Id.

9. *FTC Q&A*, *supra* note 5. A consumer can verify the date of registration on the FTC's Do-Not-Call Web Site, http://www.donotcall.gov, by clicking on the button "verify registration." *See id*.; *The National Do Not Call Registry, available at* http://www.donotcall.gov (last visited Apr. 12, 2004) [hereinafter *Do Not Call*].

requires telemarketers to access and research the FTC registry for each area code they plan to access.[10]

The national do-not-call registry has been a great success story for the FTC.[11] Between 27 June and 31 December 2003, over fifty-five million consumers registered their phone numbers on the do-not-call list.[12] From 11 October through the end of 2003, consumers lodged only a little over 150,000 complaints[13] of violations of the do-not-call registry.[14]

Unfortunately for consumers, registration on the do-not-call list will not block every telemarketer. For example, a telemarketer calling on behalf of a charity may still contact a consumer until the consumer informs the telemarketer that he does not wish to receive a telephone call on behalf of that charitable organization.[15] Furthermore, as discussed in the following sections, certain entities and calls are exempt from FTC jurisdiction.

Entities Exempt from FTC Jurisdiction

Certain businesses are specifically exempt from the FTC's jurisdiction; therefore, the TSR does not apply to them. These businesses are:

(a) banks, federal credit unions, and federal savings and loans;[16]

(b) common carriers such as long distance telephone companies and airlines;[17] and

(c) non-profit organizations,[18] which could include non-profit credit counseling or credit repair companies.[19]

Thus, these businesses may contact a consumer despite a request for them to stop.

Calls Exempt from the TSR

In addition to certain businesses, the TSR is also inapplicable to certain types of telephone calls.[20] These include:

(a) unsolicited calls from the consumer to the seller;[21]

(b) consumer calls to place catalog orders;[22]

(c) business-to-business calls, unless dealing with office or cleaning supplies;[23] and

(d) calls made in response to general media advertising or direct mail advertising, unless the advertisements relates to business opportunities, credit card loss protection, credit

10. 16 C.F.R. subpt. 310.8. The FTC's fee may range from a minimum of $25 to a maximum fee is $7,375 for each accessed area code. *Id.*

11. According to a Harris Interactive Survey released 13 February 2004, fifty-seven percent of U.S. adults have registered for the do-not-call list; ninety-two percent of those registered stated that they have received fewer telemarketer calls since they registered on the do-not-call registry; and twenty-five percent of those registered say they have received no telemarketing calls since registering. FTC for the Consumer, *Compliance with Do Not Call Registry Exceptional, Over 55 Million Telephone Numbers Registered -- Only 150,000 Complaints in 2003*, *available at* http://www.ftc.gov/opa/2004/02/dncstats0204.htm (last visited Apr. 18, 2004).

12. *Do Not Call*, *supra* note 9 (stating that by the end of 2003, the FTC registered 55,849,898 consumer numbers).

13. A consumer can file a complaint against a telemarketer for violating the do-not-call registry by accessing the FTC's Do-Not-Call web-site. *Id.*

14. *Id.* Eighty-one percent of the complaints were made on the website www.donotcall.gov; nineteen percent of the complaints were made at the toll free number 1-888-382-1222. The states with the highest number of complaints were California, with 22,584 complaints; Florida had 17,845 complaints; and Texas had 10,832 complaints. *Id.*

15. 16 C.F.R. subpt. 310.4(b)(iii)(B)(i).

16. FTC, *Complying with the Telemarketing Sales Rule*, *available at* http://www.ftc.gov/bcp/conline/pubs/buspubs/tsrcomp.htm (last visited Apr. 18, 2004) [hereinafter *Complying with the TSR*].

17. *Id.*

18. *Id.* Non-profit organizations are defined as those entities not organized to carry on business for their own, or their members' profit. *Id.*

19. 16 C.F.R. subpt. 310.3(a)(vi).

20. *Id.* subpt. 310.6(b).

21. *Id.* subpt. 310.6(b)(3). The call is exempt from the TSR unless "upselling" occurs. *See infra* text accompanying note 25.

22. *Id.* subpt. 310.6(b)(5).

23. *Id.* subpt. 310.6(b)(7).

repair advance fee loans, or investment opportunities.[24]

Although the TSR normally does not apply to these calls, if the telemarketer attempts to "upsell" the consumer during the telephone call, the TSR *will* apply.[25] Upselling is when a telemarketer or seller attempts to sell additional goods or services during a single phone call after they complete the initial transaction.[26] For example, if a consumer calls a skin products salesman to order wrinkle cream and, after completing the sale, the seller's employee attempts to sell the consumer diet pills and body lotion, then the TSR would apply to the diet pill and body lotion sales.

Partially Exempt Calls

Certain other calls are only required to follow particular provisions of the TSR. Such phone calls include:

(a) calls relating to the sale of 900 number pay per call services;[27]

(b) calls relating to the sale of franchises or certain business opportunities;[28] and

(c) calls that require a face-to-face presentation to complete the sale.[29]

When making one of these calls, the seller must follow the following provisions of the TSR:

(a) they cannot call numbers on the do-not-call registry or interfere with a consumer's right to register on the list;

(b) they cannot call before 0800 and after 2100 hours;

(c) they cannot abandon calls;[30]

(d) they must still transmit caller identification information; and

(e) they must not annoy, abuse, harass, threaten, intimidate, or use obscene language to the person called.[31]

Special Protection Telemarketing Requirements

As mentioned in the opening scenario, the TSR requires telemarketers to disclose the Fair Credit Billing Act's (FCBA)[32] fifty dollar limit on unauthorized credit card use when trying to sell a credit card loss protection plan.[33] Additionally, if the telemarketer's offer includes a negative option feature,[34] the telemarketer must disclose the following to the consumer:

(a) that the consumer's account will be charged unless the consumer takes an affirmative step to avoid the charges;

(b) the date the account will be charged; and

(c) the specific steps the consumer must take to prevent the charges.[35]

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24. *Id*. subpt. 310.6(b)(5)-(6).

25. *Id*. subpt. 310.2(dd).

26. *Id*.

27. *Id*. subpt. 310.6(b)(1). These sales are subject to the Telephone Disclosure and Dispute Resolution Act of 1992. *Id.* pt. 308.

28. *Id.* subpt. 310.6(b)(2). The FTC rule, "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures" regulates these sales. *Id*. pt. 436.

29. *Id*. subpt. 310.6(b)(3).

30. Telemarketers often use automatic dialers to call multiple consumers at once. As a result, a telemarketer may hang up on a consumer when the telemarketer has more than one party on the line—this is known as "abandoning calls." *See Complying with the TSR*, *supra* note 16.

31. 16 C.F.R. subpt. 310.6(b).

32. 15 U.S.C.S. § 1643 (LEXIS 2004). This mandatory information ensures that the consumer can make a well-informed decision on whether the plan is worth the cost.

33. 16 C.F.R. subpt. 310.3(a)(vi).

34. A negative option feature is when the seller interprets the consumer's silence as an acceptance of the offer. An example is the "free trial offer" in which a business sends a consumer a product or service for a trial period at no charge. If the consumer does not affirmatively cancel it, he will have to pay for it. The "book of the month club" is another common example. The plan requires the consumer to make a timely rejection of the offer or the consumer is bound to pay for it. *See Complying with the TSR*, *supra* note 16.

Charity Rules

As previously discussed, the TSR requires telemarketers calling on behalf of charities to disclose the charitable organization's identity and that the purpose of the call is to solicit a charitable contribution.[36] The amended TSR further states that it is a deceptive act or practice if a telemarketer acting on behalf of a charity misrepresents:

> (a) the nature, purpose or mission of the charity;[37]
>
> (b) that the contribution is tax deductible in whole or part;[38]
>
> (c) the purpose for which the contribution will be used;[39]
>
> (d) the percentage of the contribution that will go to the charity;[40]
>
> (e) any material aspect of a prize promotion;[41] or
>
> (f) either the charity's or the telemarketer's affiliation with any person or government agency.[42]

Additional Protections to Restrict Unauthorized Billing

The new TSR provisions specifically list unauthorized billing as an abusive practice.[43] Additionally, the TSR expands previous consumer protections established by the FCBA[44] and the Electronic Funds Transfer Act (EFTA).[45] The TSR protects those transactions that fall outside of the protections of the FCBA and EFTA, such as demand drafts, by requiring telemarketers to obtain express, verifiable authorization from the consumer before billing the consumer.[46]

Submitting billing information for payment without the consumer's express verifiable authorization is also a deceptive business practice or act.[47] The TSR requires that

> (a) the customer's express written authorization have the consumer's signature;[48]
>
> (b) oral authorization must be audio-recorded and show clear evidence of the consumer's authorization of the payment of goods and must show the consumer received the following information:[49]
>
> > (1) the number of payments, if more than one;[50]

35. 16 C.F.R. subpt. 310.3(a)(vii).

36. *Id*. subpt. 310.4(e) (requiring the telemarketer to disclose this information in a truthful, prompt, clear, and concise manner).

37. *Id*. subpt. 310.3(d)(1).

38. *Id*. subpt. 310.3(d)(2).

39. *Id*. subpt. 310.3(d)(3).

40. *Id*. subpt. 310.3(d)(4).

41. *Id.* § 310.3(d)(5). This includes "the odds of being able to receive a prize; the nature and value of the prize; or that the charitable contribution is required to win a prize or to participate in a prize promotion." *Id.*

42. *Id*. subpt. 310.3(d)(6).

43. *Id*. subpt. 310.4(a)(6).

44. 15 U.S.C.S. § 1666 (LEXIS 2004). The FCBA applies to all open-end credit accounts—the most important are consumer credit cards. *See id.*

45. *Id.* § 1693a-r. The EFTA applies to point of sale transfers, automated teller machine transfers, direct deposits or withdrawals, transfers initiated by telephone, and debit card use. The EFTA applies to a consumer's account with a financial institution. *See id*.

46. 16 C.F. R. subpt. 310.4(w). "Pre-acquired account information" is any information that allows the telemarketer to charge the consumer's account without obtaining the information directly from the consumer during that particular telemarketing transaction. *Id.*

47. *Id*. subpt. 310.3(a)(3).

48. *Id*. subpt. 310.3(a)(3)(i). The signature can be electronic or digital. *See id*.

49. *Id*. subpt. 310.3(a)(3)(ii).

50. *Id*. subpt. 310.3(a)(3)(ii)(A) (payments, debits, or charges).

(2) the date the payments will be submitted for payment;[51]

(3) the amount of payment;[52]

(4) the consumer's name;[53]

(5) the consumer's billing information;[54]

(6) a telephone number the consumer can contact during normal business hours with any questions;[55] and

(7) the date of the oral authorization;[56] and

(c) the telemarketer may also send written confirmation of the sale or donation via first class mail with all the information in (1)-(7) above clearly listed along with the information on how to obtain a refund before the consumer submits anything for payment.[57]

If the telemarketer has pre-acquired account information[58] and a free-to-pay conversion[59] feature, the telemarketer must:

(a) obtain from the consumer at least the last four digits of the account to be charged;

(b) obtain from the consumer his express agreement to be charged using that account; and

(c) make an audio recording of the entire transaction.[60]

For all situations other than a free-to-pay conversion, if the telemarketer has pre-acquired information, he is required to:

(a) at a minimum, identify the account to be charged in an understandable way to the consumer; and

(b) obtain from the consumer his express agreement to be charged using the account described.[61]

Enforcement

Violators of the TSR face civil penalties up to $11,000 per count.[62] Unfortunately, the Telemarketing and Consumer Fraud and Abuse Prevention Act only allows for a private cause of action if the plaintiff's damages exceed $50,000.[63] The FTC has the authority to enforce the TSR. State attorneys general, however, are authorized to file suit in federal court for injunctive relief, damages, restitution, and other relief.[64] The Federal Communications Commission administers the Telephone Consumer Protection Act of 1991 (TCPA)[65] which offers a private

51. *Id.* subpt. 310.3(a)(3)(ii)(B).

52. *Id.* subpt. 310.3(a)(3)(ii)(C).

53. *Id.* subpt. 310.3(a)(3)(ii)(D).

54. *Id.* subpt. 310.3(a)(3)(ii)(E). The consumer's billing information must be identified in such a manner that the consumer understands which account will be used for the payment. *Id.*

55. *Id.* subpt. 310.3(a)(3)(ii)(F).

56. *Id.* subpt. 310.3(a)(3)(ii)(G).

57. *Id.* subpt. 310.3(a)(3)(iii). The means of verification cannot be used in a transaction involving free-to-pay conversion and preacquired account information. *Id.*

58. *Id.* subpt. 310.2(a)(6)(i)(A).

59. *Id.* subpt. 310.2(o). A "free-to-pay conversion" occurs when a consumer gets a product for an initial period for free and then incurs an obligation to pay once a certain period expires if the consumer does not take affirmative action. *Id.*

60. *Id.* subpt. 310.4(a)(6)(i)(A)-(C).

61. *Id.* subpt. 310.4(a)(6)(ii)(A)-(B).

62. Section 5(m)(1)(A) of the FTC Act, 15 U.S.C.S. § 45(m)(1)(A) (LEXIS 2004), along with section four of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C.S. § 2461, authorizes the court to award civil penalties of not more than $11,000 for each violation. Further violations can result in an injunction or the requirement to pay redress to a consumer. 28 U.S.C.S. § 2461.

63. 15 U.S.C.S. § 6104(a). If there is a private cause of action, the FTC requires that it receive prior written notice of the complaint. *Id.*

64. *Id.* § 6103(a).

cause of action in state court for violations. The TCPA cause of action is narrower than the Telemarketing and Consumer Fraud and Abuse Prevention Act—the TCPA's main protection is statutory damages of $500 per call (up to $1500 if willful or knowing) if the telemarketing phones before 0800 or after 2100 hours.[66] Most states have enacted some type of protection against telemarketing fraud that provides consumers with a private cause of action.[67] As with all consumer protection issues, it is critical for practitioners to research their respective state laws.

Conclusion

The Telemarketing and Consumer Fraud and Abuse Prevention Act's amendments to the TSR provide consumers with much needed relief from those annoying dinner-time calls by telemarketers. Further, additional protections of the amended TSR thwart the latest schemes of unscrupulous telemarketers, such as the recent credit card loss protection insurance scam which defrauds consumers of their hard earned dollars. Awareness of these new TSR protections will help combat fraudulent and deceptive telemarketers.

65. 47 U.S.C.S. § 227.

66. *Id.* The Act also prohibits (1) sending unsolicited advertisements to fax machines; and (2) using an automatic dialing system to call emergency phone lines, rooms in hospitals and nursing homes, or other services when the called party is charged for receiving the call. The TCPA also prohibits using an artificial or pre-recorded voice to contact a residence without prior consent unless an exception applies. *Id.*

67. State Telemarketing Statutes include the following states: ALA. CODE §§ 8-19A-1–8-19A-24 (2004); ALASKA STAT. § 45.63.010 (2004); ARIZ. REV. STAT. ANN. § 44-1271 (LEXIS 2004); ARK.CODE ANN. § 4-99-101 (Michie 2003); CAL. BUS. & PROF. CODE § 17511 (2004); COLO. REV. STAT. § 6-1-301 (2003); CONN. GEN. STAT. §§ 42-284–42-289 (2003); DEL. CODE ANN. tit. 6, §§ 4401–4405 (2004); FLA. STAT. ANN. § 501.059 (2004); GA. CODE ANN. §§ 10-5B-1–10-5B-8 (2002); HAW. REV. STAT. §§ 481P-1–481P-8 (2003); IDAHO CODE §§ 48-1001–48-1010 (Michie 2004); 815 ILL. COMP. STAT. ANN. 413/1–413/30 (LEXIS 2004); IND. CODE ANN. §§ 24-5-12-1–24-5-12-25 (Michie 2004); IOWA CODE ANN. § 714.8(15) (LEXIS 2004); KAN. STAT. ANN. §§ 50-670–5-675 (2003); KY. REV. STAT. ANN. §§ 367.46951–367.46999 (Michie 2002); LA. REV. STAT. ANN. §§ 45:821–45:831 (LEXIS 2004); ME. REV. STAT. ANN. tit. 10, §§ 1498–1499 (LEXIS 2004); MD. COM. LAW §§ 14-2201–14-2205 (2003); MASS. GEN. LAWS ANN. ch. 159, § 19E (LEXIS 2004); MICH. COMP. LAWS ANN. § 445.111 (LEXIS 2004); MINN. STAT. ANN. § 325E.26-31 (LEXIS 2004); MISS. CODE ANN. §§ 77-3-601–77-3-619 (2004); MONT. CODE ANN. §§ 30-14-1401–30-14-1414 (2003); NEB. REV. STAT. §§ 86-1201–1222 (2004); NEV. REV. STAT. ch. 599B; N.H. REV. STAT. ANN. §§ 359-E:1–359-E:6 (2003); N.J. ADMIN. CODE 13:45A-1.1 (2004); N.M. STAT. ANN. 57-12-22 (Michie 2004); N.Y. PERS. PROP. LAW §§ 440–448 (2004), N.Y. GEN. BUS. LAW § 399-pp (2004); N.C. GEN. STAT. §§ 66-260–66-269 (2004); N.D. CENT. CODE § 51-18 (2004); OHIO REV. CODE ANN. §§ 4719.01–4719.99 (2004); OKLA. STAT. ANN. tit. 15, § 775A (2004); OR. REV. STAT. §§ 646.551–646.578 (2001); 73 PA. STAT. §§ 2241–2249 (2003); R.I. GEN. LAWS §§ 5-61-1–5-61-6 (2003); S.C. CODE ANN. §§ 16-17–445 (2003); S.D. CODIFIED LAWS §§ 37-30A-1–37-30A-17 (Michie 2003); TENN. CODE ANN. § 47-18-1526 (2003); TEX. BUS & COM. CODE ANN. §§ 38.001–44.200 (LEXIS 2004); UTAH CODE ANN. §§ 13-26-1–13-26-11 (2003); VT. STAT. ANN. tit. 9, § 2464 (2003); VA. CODE §§ 59.1-21.1 –59.1-21.7 (LEXIS 2004); WASH. REV. CODE ANN. §§ 19.158.010–19.158.901 (LEXIS 2004); W. VA. CODE ANN. §§ 46A-6F-101–46A-6F-703 (LEXIS 2004); WIS. STAT. ANN. §§ 423.201–423.205 (LEXIS 2003); WYO. STAT. ANN. §§ 40-14-251–40-14-255 (Michie 2003).